

No. 2515.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

O. ITOW and E. FUSHIMI,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

JNO. J. REAGAN,

United States Attorney for District of
Alaska, First Division,
Attorney for Defendant in Error.

JNO. W. PRESTON,

United States Attorney for Northern
District of California;

M. A. THOMAS,

Assistant United States Attorney for
Northern District of California,

Of Counsel.

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F. D. MONCKTON, Clerk.

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BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Plaintiffs in error were indicted on December 13, 1912, for murdering one Frank Dunn. Itow was convicted of murder in the first degree and sentenced to death. Fushimi was convicted of manslaughter and sentenced to 20 years' imprisonment in the United States penitentiary at McNeil's Island.

Itow was the Japanese foreman of a gang of Japanese, Mexican and Porto Rican laborers employed under contract in a cannery at Dundas Bay, Alaska. Among the employees in this gang was one American, the deceased. The men under Itow were employed for the cannery by a Japanese contractor

and put in Itow's charge. They were obtained in the United States, transported from Seattle to Alaska, paid about \$140 for the season at the close of their term of employment, and in the meantime money and goods were advanced to them. If any of them left their employment before the end of the season, Itow was obliged to make good the advances thus made to the deserting employee. Dunn, the deceased, had received \$30 advance money and some stuff in addition.

There were also a number of Chinamen employed at the cannery, under the charge of a Chinese foreman. These Chinamen, together with the Mexicans and Frank Dunn, ate and slept in a building known as the "China House". The Japanese occupied a separate building. Dunn roomed with seven other laborers, Mexican and Porto Rican. The above facts are undisputed.

On July 14, 1912, between 10 and 12 o'clock at night, Frank Dunn was killed in front of the "China House" by a sword in the hands of Itow.

According to the Government's witnesses, Itow and Fushimi (the latter one of the Japanese laborers) had been looking for Dunn for several hours, Fushimi stating that Dunn was trying to get away from them, and that if they caught him they would kill him. Admittedly Itow had been drinking freely, and was somewhat drunk at the time of the killing. One of the Government's witnesses had met him in the "Indian Town" near the cannery, and Itow had taken a revolver from his pocket and pointed it at the

witness. He was then induced to go home by Fushimi, who realized his condition.

Shortly after returning from the "Indian Town", Itow and Fushimi went to the "China House", knocked on the door, demanded admission, and asked for Frank Dunn. They were admitted by Dunn, who asked what they wanted. A brief discussion then took place between Itow and Dunn in regard to the latter quitting his employment. The two defendants (according to several witnesses, assisted by a third Japanese), took hold of Dunn and pushed him out of the door. Here the accounts vary. According to the American witnesses outside the "China House", the Japanese rushed Dunn down the inclined gangway which led to the entrance of the house, turned with him to the left, and got him partly down. With Fushimi and the other Japanese holding him down Itow thrust the sword into him. According to the Mexicans who saw the fracas from within the doorway the Japanese pushed Dunn off the runway; Dunn fell to the ground on the side, and Itow then jumped on top of him and ran the sword into him. The witnesses agree that Dunn was at least part way down when Itow stabbed him with a downward thrust of the sword. Dunn died almost immediately. He had apparently said or done nothing to incite the attack and had been able to make no effective resistance.

The Mexican foreman came to the door and asked Itow why he had killed Dunn. Itow, who was then standing on the runway, flourished the sword and his

revolver and defying and threatening those within, replied, "I killed him, and if you don't be careful I will kill you, too", or words to that effect. About that time the Mexicans inside the doorway began to throw cordwood and other missiles at Itow. The latter fired his revolver in the direction of the Mexican foreman. The bullet struck and wounded another Mexican, the witness Castillo.

The witness Nelson, superintendent of the cannery, had come up in the meantime, and was shouting to Itow and telling him to come away. Itow paid no attention at first, but after firing the shot above mentioned walked over to Nelson, dropped his sword and pistol in front of him and gave himself up to his custody. The superintendent had been notified of the killing by Fushimi.

The testimony for the defendants, on the other hand, tended to prove that Itow and Fushimi had been making inquiries after Dunn during the day in order to find him and persuade him not to go away, as they suspected he meant to do; that after their return from "Indian Town" Fushimi, at Itow's request, went with Nakayama (another Japanese) to the "China House" to lock the door and thus prevent Dunn from escaping; that Dunn objected to this procedure, assaulted Fushimi and Nakayama with his fists, and knocked them off the incline; that Itow, hearing the commotion, took his sword and went to the "China House" to protect his men and stop the fight; that Dunn was about to strike him, so that he attempted to strike Dunn with the sword

in its scabbard; that Dunn seized the scabbard, struck Itow with his other hand, knocked him down from this inclined runway to the ground and leaped or fell on top of him; that in so doing the scabbard came off the sword, of which Itow retained possession, and that Dunn fell upon the point of the sword and was thereby mortally wounded.

Dunn, it was asserted, was under the influence of liquor at the time. Itow testified that he was unaware that Dunn had been killed until the next morning at breakfast. Itow claimed to be badly shaken and dizzy from the fall.

Notwithstanding the fact that he had been looking for Dunn for several hours with a view to "persuading" Dunn to remain at the cannery, yet when he finally found Dunn he concluded not to indulge in moral suasion for fear that would hurt Dunn's feelings, but determined to lock the door of the house.

Such is in substance the conflict of evidence which the jury resolved against the defendants.

The first assignment of error relates to the court's refusal to grant a continuance. The indictment had been found December 13, 1912. July 18, 1912, Itow was bound over by the commissioner at Juneau to await the action of the grand jury. December 20 the defendants made application for process to compel the attendance of their principal witnesses, Nakayama, Tanamichi and Oogong, at Government expense, alleging that these witnesses were in Seattle, Washington, and Portland, Oregon. The case came on for trial on January 2, 1913. Counsel for the

defendants then requested a continuance on the ground that the witnesses had started from Seattle, but had not yet arrived; the court, however, ruled that the jury should be impanelled pending their arrival. Later that same day counsel stated that the witnesses had missed their steamer but would probably be along on the next steamer. The court again refused the application for a continuance. The matter came up again the next day after the impanelling of the jury, when counsel for the defense refused to make an opening statement because he had not yet talked to the absent witnesses, and asked to reserve the privilege until he had seen them. The court did not rule on this request, and it was never renewed. Subsequently two continuances, amounting to four days in all, were granted pending the arrival of those witnesses. The trial went on after their arrival. Defendants assign as error the court's original refusal to postpone the trial until January 15 on the ground that counsel was thereby denied a reasonable opportunity to see the witnesses and prepare for trial, and that the court thereby in effect denied "to defendants the right to have their counsel make an opening statement to the jury".

The third assignment of error goes to the court's permitting the jury to separate at each recess of court until the conclusion of the evidence. This was done with the express consent of counsel for both sides. The court was scrupulously careful to instruct the jury in great detail at each adjournment to avoid discussing the case with any one or listening to any dis-

cussion about it, and directed them to inform the court of any wilful attempt to influence them by argument or otherwise.

The second assignment of error was founded on the court's refusal to discharge the jury and enter a mistrial on defendant's motion because of an article published in a paper in the town of Juneau, where the trial was had, during the trial and while the jury was at large. The article in question quoted a brief statement by the United States attorney in regard to offenses of violence among the orientals employed in the canneries, and then proceeded to comment on the murder of Dunn, and on a similar offense in another cannery. The United States attorney admitted having talked to the newspaper reporter about the case, but asserted that he did so with no intention or purpose of having his remarks published and, indeed, that he had frequently instructed this very reporter and other representatives of the press not to publish any statements concerning cases on trial or to be tried. His affidavit to this effect is supported by an affidavit of the reporter who published the offending article. The court, upon a motion to discharge the jury on this account, called the jury in and, reminding them of his previous request to them to refrain from reading newspapers during the trial unless expurgated of anything relating thereto, asked whether any of them had read the article referred to, which the court described as "an article that was entitled 'Japanese accused of many crimes' and purported to give a history of general conditions about canneries and

incidentally touched upon at least one phase of the present case that we are trying". The court then directed that if any juror had read the article he should let the court know by raising his right hand; and then put the question directly. None of the jurors responded and the court thereupon denied the motion.

The fourth assignment of error relates to the admission in evidence of a statement made by defendant Fushimi to the district attorney before the indictment was found. At the request of the United States attorney the court allowed the Government to reopen its case after some of the defendants' testimony was in. The United States attorney thereupon introduced the statement made to him by Fushimi on December 10, 1912. Its introduction was objected to by the defense "on the part of the defendant Fushimi for the reason that it is a privileged communication; was taken when he was asked to make a statement to the district attorney, and that it can not be used without his consent". On the part of Itow it was objected to on the ground "that it is * * * hearsay, and that if the Government intended to use it as a confession or an admission from the codefendant Fushimi that they should have had separate indictments and separate trials and couldn't go in evidence without possibly prejudicing the jury against the defendant Itow". The United States attorney then said: "We submit it as a confession or admission on the part of Fushimi as to certain facts. It is true it isn't evidence against Itow, but they are tried together.

They did not ask for a separate trial." And again, "I offer it simply as evidence against Fushimi."

The statement in question was made in response to questions of the United States attorney, and through an interpreter. Fushimi had not been sworn. The statement was verified at the trial by the interpreter and the stenographer who transcribed it.

This statement differed in material respects from Fushimi's testimony on the stand. For example, Fushimi testified in court that he had gone to the China House in order to lock Dunn in, and that Dunn had then struck him and Nakayama; while in his previous statement he had asserted that he went there to use the water-closet; that he knocked on the door and Dunn let him in; that Dunn did nothing in his presence before striking Itow; and that the trouble began with Dunn's attack on Itow. The principal effect of the alleged confession was to impeach Fushimi's testimony on the stand. Indeed, Fushimi admitted the discrepancy and that he had lied in his statement to the United States attorney, alleging that he did so in order to shield Nakayama, Itow and himself. The statement also left the impression that Itow, though attacked first and knocked down by Dunn, had deliberately struck the latter with his sword.

The court did not specifically instruct the jury that the statement was evidence only against Fushimi, nor was it requested to do so.

The fifth, sixth and seventh assignments of error relate to alleged refusals by the court to give in-

structions requested by the defense. The requested instruction to which the fifth assignment relates, dealing with the effect of the testimony of defendants in court, was given in substance in the thirty-second and thirty-sixth instructions.

The sixth assignment of error is unfounded in point of fact, since the court did not refuse to give the instruction there recited, but gave it *verbatim*.

The seventh assignment of error relates to the court's refusal to instruct the jury that homicide was justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant, or in the lawful attempt to prevent a riot or preserve the peace. There was no evidence introduced which tended to raise this defense; the whole theory of the defense was that Dunn was killed unintentionally and by accident as the result of falling on Itow's sword. The court instructed the jury in detail that if they had reasonable doubt as to whether Dunn was thus accidentally killed they should acquit.

The eighth and last assignment of error apparently goes to the court's refusal to grant a new trial, alleging that the verdict was contrary to law, the instructions of the court, and the evidence, in that Itow was found guilty of first degree murder and Fushimi of manslaughter, whereas under the evidence and instructions they must have been guilty, if guilty at all, of the same degree of homicide.

THE COURT'S REFUSAL TO GRANT THE CONTINUANCE REQUESTED BY DEFENDANTS WAS WITHIN ITS SOUND DISCRETION, AND THAT DISCRETION WAS NOT ABUSED.

Section 2221 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 112) provides:

That when an indictment is at issue upon a question of fact, and before the same is called for trial, the court may, upon sufficient cause shown by such affidavits as the defendant may produce, or the statement of the district attorney, direct the trial to be postponed to another day in the same term or to another term; and all affidavits and papers read on either side upon the application must be first filed with the clerk.

In *Hardy vs. United States* (186 U. S. 224) it was held:

That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question. (Citing *Goldsby vs. United States*, 160 U. S. 70; *Isaacs vs. United States*, 159 U. S. 487, 489, and authorities there cited.)

This case arose under this identical provision of the Alaska Code. It is too late, therefore, to doubt that the section confers the usual discretion upon the trial court in the matter of continuance.

Pickett vs. United States, 216 U. S. 456, 461;
Franklin vs. South Carolina, 218 U. S. 161,
 168.

There is no ground for asserting that this discretion was abused in the instant case. The circumstances heretofore outlined show that defendants' counsel had not used due diligence in summoning witnesses; that although defendants were indicted on December 13, and had been committed nearly five months previous, no attempt was made to obtain process for witnesses until December 20. Under these circumstances the court was justified, in view of the condition of its docket, in commencing the trial upon the date set.

Defendants suffered no prejudice from this ruling. The court granted two continuances of two days each pending the arrival of the witnesses, and the only difference made by its refusal to grant the continuance requested was that defendants' counsel was unable to see his witnesses before the trial commenced and thus to make an opening statement. This was at least as prejudicial to the Government as to the defense. The conclusion is inevitable that counsel refused to make this opening statement in order to preserve the exception on the record, feeling that he could do so without materially affecting his clients' chances. The immateriality of the matter to his mind is shown by his failure to renew the suggestion that he might make his statement at the commencement of defendants' case instead of at the beginning of the trial, although the court had not ruled upon it.

THE COURT'S PERMISSION TO THE JURY TO GO AT LARGE, AND THE REFUSAL TO DISCHARGE THE JURY, WERE NOT REVERSIBLE ERROR.

(a) *Permitting the jury to separate.*

Section 2247 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 138) provides:

That when a case is finally submitted, the jurors must be kept together in some convenient place under the charge of an officer until they agree upon a verdict or are discharged by the court; * * * and if the jurors be permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with, nor to suffer themselves to be addressed by, any person, nor to listen to any conversation on the subject of the trial, nor to form or express an opinion thereon, until the case is finally submitted to them.

The language of this provision seems to leave it to the discretion of the trial court whether or not to keep the jury together during the trial. The section is taken literally from Section 7312 of Bates' Annotated Ohio Statutes. Under that section it has been held that the matter is discretionary with the trial court even in capital cases. (*Bergin vs. State*, 31 Ohio St. 114, and cases cited.)

Under Section 198 of Hill's Annotated Code of Oregon, apparently in force in Alaska before the adoption of the Code of 1899, the matter was expressly left to the discretion of the court, and this

is held to apply in capital cases. (*State vs. Shaffer*, 23 Oreg. 555.)

This is a generally accepted rule. (Clark, Crim. Pro., 478; *Armstrong vs. Oklahoma*, 24 L. R. A. [N. S.] 776 and note; *Holt vs. United States*, 218 U. S. 245, 251.)

Clearly there was no abuse of discretion in the present case. As we have seen, the court took the utmost pains to instruct the jury in great detail concerning their duty not to listen to conversations upon the subject of the trial. The jury were permitted to separate by the express consent of counsel for the defendants as well as the United States attorney, the latter subsequently taking oath that this was done in order to get a better class of men on the jury. It would be a triumph of double-dealing to allow defendants to obtain a reversal on any such ground as this.

(b) *Refusal to discharge the jury.*

In *Mattox vs. United States* (146 U. S. 140, 150) the Supreme Court reversed the trial court for its failure to consider affidavits stating that a newspaper account of the trial highly prejudicial to the defendant had been read to the jury. The effect of the *Mattox* case is explained in *Holmgren vs. United States* (217 U. S. 509, 522), where it is said:

To the like effect is *Mattox vs. United States*, 146 U. S. 140, where the court below refused to entertain affidavits showing the reading of a newspaper, containing an unfavorable article, during the deliberations of the jury, and also damaging remarks of an officer in charge of the

jury during the progress of the trial. In both cases the basis of the action of the reviewing court was the refusal of the courts below to exercise the discretion vested in them by law.

Here there was no such failure to exercise the discretion vested in the trial court.

However, the question is hardly open to discussion since the decision in *Holt vs. United States* (218 U. S. 245). There the identical question arose. The Supreme Court, through Mr. Justice Holmes, stated the circumstances and the appropriate rule of law as follows:

We will take up in this connection another matter not excepted to but made one of the grounds for demanding a new trial, and also some of its alleged consequences, because they also involve the question how far the jury lawfully may be trusted to do their duty, when the judge is satisfied that they are worthy of the trust. The jurymen were allowed to separate during the trial, always being cautioned by the judge to refrain from talking about the case with any one and to avoid receiving any impression as to the merits except from the proceedings in court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that they had read the Seattle daily papers with articles on the case while the trial was going on. He set forth articles contained in those papers, and moved for a new trial. The court refused to receive counter-affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the public prints is so

obvious, that for the purpose of passing on the permission to separate it may be assumed that they did so in this case.

We are dealing with a motion for a new trial, the denial of which can not be treated as more than matter of discretion or as ground for reversal, except in very plain circumstances indeed. *Mattox vs. United States*, 146 U. S. 140. See *Holmgren vs. United States*, 217 U. S. 509. It would be hard to say that this case presented a sufficient exception to the general rule. The judge did not reject the affidavit, but decided against the motion on the assumption that more than it ventured to allege was true. As to his exercise of discretion, it is to be remembered that the statutes or decisions of many states expressly allow the separation of the jury even in capital cases. Other states have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. Without intimating that the judge did not go further than we should think desirable on general principles, we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong. (pp. 250-251.)

That was a much stronger case for the defendant than is this. There it was assumed that the jurors had read the articles dealing with the case; here the trial judge was satisfied that they had not. There is nothing in the record to suggest that the court was misled in this matter. Counsel did not attempt to prove by affidavits or otherwise that a single member of the jury had read the article, but contented him-

self with the general statement (not sworn to) in his motion for a new trial that defendants believed the United States attorney gave out the interview to prejudice their case. This not only is denied by the United States attorney's affidavit and that of the newspaper man who was responsible for the story, but is unsupported by a single shred of evidence in the record.

It might be suggested that defendants in the present case are in a better position than the prisoner in the Holt case in that here the objection was made and exception taken at once, while there it was merely alleged as a ground for demanding a new trial. There is nothing in this distinction. Section 2248 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 139) provides:

That the court discharge a jury without prejudice to the prosecution for the sickness of a juror, the corruption of a juror, or other accident or calamity, or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal.

Assuming that the influencing of the jury by adverse newspaper comment might be deemed an "accident or calamity", and so within the purview of this section, it is evident that the propriety of such discharge, like the granting of a new trial, is left to the discretion of the trial court. This is the accepted rule. (*Usborne vs. Stephenson*, 48 L. R. A. 432, 434, note.)

Since no abuse of that discretion has been shown, there is no question involved for this court to review.

The Statement of Fushimi was Properly Admitted.

If the alleged confession by Fushimi had been extorted from him under such circumstances of confinement, threats, promises, duress or intimidation as to render it involuntary its introduction in evidence against him would be a violation of his constitutional right not to incriminate himself. (*Bram vs. United States*, 168 U. S. 532.) There are several difficulties, however, in applying that doctrine to the present case.

In the first place, Fushimi's statement was not objected to on any such ground. It was not even intimated by counsel for the defense that the statement had been improperly extorted. The objection made was an entirely different one—that it was a privileged communication. This objection clearly did not go to the constitutional right of Fushimi. So far as its involuntary character is concerned, therefore, the statement must be assumed to have gone in evidence without objection on the part of defendants.

Besides, there is nothing in the record to indicate that the statement was involuntary. The circumstances under which it was made are not related in great detail nor as fully, doubtless, as they would have been if the prosecution's attention had been directed by an appropriate objection to the present question. The circumstances which appear, however, all tend to show its voluntary character. Fushimi was not a prisoner, nor in confinement; he was merely asked to make a statement to the United States attorney, and made it. It may safely be assumed that if there had been any facts indicating extortion or

the like they would have been brought to light by the defense.

Where defendants are jointly tried for a single offense, a previous statement made by one of them since the commission of the offense is admissible against him, even though not against the other defendant or defendants who were not present when the statement was made. (*Sparf & Hansen vs. United States*, 156 U. S. 51; *United States vs. Ball*, 163 U. S. 662; *Fitzpatrick vs. United States*, 178 U. S. 304.) In the *Sparf & Hansen* case the conclusion of the Supreme Court was:

We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, *and admitted them against Hansen.* (p. 58.)

In the *Ball* case the same court said, at page 672:

These two defendants moved that they be tried separately from Millard F. Ball, because he had been previously acquitted; because the government relied on his acts and declarations made after the killing and not in their presence or hearing; and because he was a material witness in their behalf. But the question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below. *United States vs. Marchant*, 12 Wheat. 480. It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together,

or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against the others. See *Sparf vs. United States*, 156 U. S. 51, 58. On the contrary, upon the offer by the United States of evidence of declarations made by Millard F. Ball after the killing and not in the presence of the other defendants, and upon an objection to its admissibility against them, the court at once said, in the presence of the jury, that, of course, it would be only evidence against him, if he said anything; *and the court was not afterwards requested to make any further ruling upon this point.*

It may be suggested that the court might well have instructed the jury specifically not to regard the statement as evidence against Itow; and such an instruction would undoubtedly have been appropriate. But the United States attorney, in introducing the confession, reiterated the assertion that it was offered as evidence only against Fushimi; the jury could therefore have been left in no doubt as to their duty in the premises. Besides, the suggestion that the court's failure to give specific instruction upon this point was error is answered by the passage above quoted from the Ball case. Here, as there, no instruction upon this point was asked; and it is a settled rule of practice that error can not be assigned to a failure to give an instruction not requested. (*Isaacs vs. United States, supra*, 491; *Humes vs. United States*, 170 U. S. 210.)

The objection on the part of Fushimi was that his statement to the district attorney was privileged.

Counsel evidently had in mind the familiar rule of criminal evidence—applied by the Supreme Court in *Vogel vs. Gruaz* (110 U. S. 311)—that a complaint to a prosecuting attorney of the commission of crime is a privileged communication. Even if this were such a disclosure, the privilege is that of the Government, not of the informer. (*Vogel vs. Gruaz, supra*, 316.)

But the doctrine of confidential communications is not applicable. Fushimi made no charge of crime. The district attorney was examining a number of witnesses to ascertain the true facts of the homicide. Each witness could refuse to talk only on the ground of self-incrimination. It is now too late to add to that constitutional protection another rule that any voluntary statement by a criminal can not be used if it happens to be made to an officer of the law.

Again, the substance of Fushimi's statement, in contradiction to his testimony, was contained in an affidavit made jointly by both defendants on their application for the summoning of witnesses. This affidavit was put in evidence to contradict them.

THE REJECTED INSTRUCTIONS OFFERED BY THE DEFENDANTS WERE BAD.

As before stated, one of these instructions, the refusal of which is assigned as error, was in fact given in terms by the court as No. 4.

Of the prayers refused, the first related to the weight to be given to the defendants' testimony and

the other to a homicide committed in preventing a felony or suppressing a riot.

As offered, both were erroneous. The law covering the different theories of the case was fully explained to the jury.

(a) The prayer covering the testimony of the defendants was given to the jury in substance. The court omitted from the instruction the following:

In a case of this kind you should determine whether that statement (of the defendants) is corroborated substantially by proven facts; if so it is strengthened to the extent of its corroboration. If it is not so strengthened in that way you are to weigh it by its own inherent truthfulness.

It was erroneous to refer to corroboration without mentioning contradiction; the suggestion was that the testimony was strengthened in the one case, but was not weakened in the other.

(b) The other instruction which was refused is:

You are instructed that the killing of a human being is justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant or in the lawful attempt to suppress a riot or preserve the peace. So in this case if you find and believe from the evidence that the deceased, Frank Dunn, was attempting to commit a felony upon the persons of Nakayama and Fushimi, and that Itow was the foreman in charge of said Nakayama and Fushimi, and that in the attempt on the part of Itow to prevent the commission of such felony, the deceased was killed; or if you have a reasonable doubt as to whether the deceased did not lose his life in that way then you must acquit.

It would also be your duty to acquit if you believe that at the time Itow reached the scene of the fatality there was a riot in progress or a breach of the peace was taking place and Itow was making a lawful attempt to suppress such a riot or preserve the peace or if you have a reasonable doubt as to whether the killing did not so occur in either case the defendants are not guilty.

There were no facts in evidence, and no theory was advanced on either side warranting such an instruction. It was therefore properly refused. (*Bird vs. United States*, 187 U. S. 118, 132.)

According to the testimony for the Government, the killing of Dunn was a wanton and premeditated murder by Itow; while the evidence of the defendants tended to show that it was purely accidental. The defense denied that Itow killed Dunn intentionally, either in self-defense or to prevent the commission of a crime by Dunn.

While the prayer is inartificially drawn and is broad enough to cover both an accidental and in intentional killing happening in an affray, it is clearly directed to an intentional killing in self-defense or to prevent a breach of the peace. This theory of the prayer was utterly inconsistent with defendants' testimony (of accidental killing), and for that reason was properly rejected. (*Fearson vs. United States*, 10 App. Cas., D. C. 536, 539.)

Aside from this inconsistency, the prayer is bad for many reasons.

There was no evidence that Dunn was attempting to

commit a felony. Fushimi's claim was that Dunn had assaulted him. This was a simple assault punishable by imprisonment for not more than six months (Comp. Laws of Alaska, sec. 1905), and therefore not a felony (*ibid*, sec. 2065). There was no riot; three men were fighting, which was an affray at the most. There was no evidence that Itow *attempted* to prevent a felony or breach of the peace or suppress a riot. Itow claimed that he went to the China House to protect his men, but no fighting was going on when he got there.

A "lawful" attempt to suppress a riot was not defined. Here is the real vice of the instruction. It is a practical statement that Itow was justified in killing Dunn in order to stop a fist fight between him, Fushimi, and Nakayama, even though Dunn was acting in self-defense and the fight might have been stopped in a less drastic way.

The essential qualification that the killing must be necessary, and that the violation of the law can not otherwise be suppressed, is omitted from the prayer. (Clark & Marshall, Crimes [2d ed.], pp. 383-385.)

The instructions actually given by the court fully stated the law applicable to the facts.

THE JUDGMENT CAN NOT BE REVERSED BECAUSE THE VERDICT WAS CON- TRARY TO THE EVIDENCE.

This has been asserted too often to require argument. (*Humes v. United States, supra; Crumpton v.*

United States, 138 U. S. 361; *Moore v. United States*, 150 U. S. 57, 61; *Johnson v. United States*, 228 U. S. 457, 459.)

The point of this objection is that one defendant was convicted of murder in the first degree and the other of manslaughter.

True, the jury might have found both defendants guilty of murder in the first degree. But there was ample evidence to justify their conclusion. If Itow purposely, and after deliberation and premeditation, killed Dunn, the verdict as to him was correct.

But if Fushimi himself had no purpose to kill, and did not know of Itow's intention to kill, he would be guilty of murder in the second degree at the most. And if the jury believed—finding some truth in the testimony on both sides—that Dunn struck Fushimi and knocked him down, and that Fushimi in the heat of passion resulting from the blow aided in the killing, their verdict of manslaughter was justified.

The verdict of guilty in different degrees is therefore perfectly proper.

Brown vs. State, 28 Ga. 199, 213;
Wharton on Homicide (3d ed.), sec. 440.

However, the matter arises on motion for a new trial. The action of the trial court on such motion is not assignable as error.

Pickett vs. United States, 216 U. S. 456;
Bucklin vs. United States, 159 U. S. 682;
Holmgren vs. United States, 217 U. S. 521.

We therefore respectfully ask that the judgment of the District Court be affirmed.

JNO. J. REAGAN,
United States Attorney for District of
Alaska, First Division,
Attorney for Defendant in Error.

JNO. W. PRESTON,
United States Attorney for Northern
District of California;

M. A. THOMAS,
Assistant United States Attorney for
Northern District of California,
Of Counsel.